



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 455 OF 2008

ALBERT EKIRAPA.....1ST PLAINTIFF
AHMED SHEIKH TAKOY.....2ND PLAINTIFF
ROSE MUTHONI.....3RD PLAINTIFF
ANTONY MORAGWA.....4TH PLAINTIFF
HENRY NJAGE.....5TH PLAINTIFF
PATRICK LUMUMBA.....6TH PLAINTIFF
JANE OMARI.....7TH PLAINTIFF
MARY APOLA.....8TH PLAINTIFF
JULIUS KIITI.....9TH PLAINTIFF
MWANGI SALIM.....10TH PLAINTIFF

Suing on behalf of themselves and the Parents Association

(School Committee) of Aga Khan Primary School, Nairobi

VERSUS

THE AGA KHAN FOUNDATION.....1ST DEFENDANT
AGA KHAN EDUCATION SERVICES KENYA.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiffs were officials of the Parents Association of Aga Khan Primary School. The 1st Defendant is a registered proprietor of L.R. No. 209/3576 situated in Parklands area of Nairobi (“the Suit Property”). The Suit Property was initially granted to Sultan Mohammed Shah Aga Khan in 1952 and was later transferred to the 1st Defendant in 1978. The 2nd Defendant manages various Schools owned by the 1st Defendant in Kenya. Aga Khan Primary School (“the School”) stands on the Suit Property. The Plaintiffs brought this suit claiming that the School was a public School within the meaning of Section 2 of the Education Act because since its establishment in 1951, Government funds and public finances through levies and other contributions made by parents, have been used to develop infrastructure, pay teachers and to manage and run the School’s programs.

2. The Plaintiffs averred that the 1st Defendant holds the title over the Suit Property in trust for the general public including successive generations of parents and pupils for educational purposes. Further, they averred that during its formative years, the School was built using public funds and the grant issued to the 1st Defendant stipulated that the Suit Property would be used only for educational purposes for both

sexes. The Plaintiffs urged that the Government used to pay most of the teachers at the School save for those who taught Islamic Religious Education. They added that the City of Council of Nairobi had extended public funds in the operation and management of the School and that successive parents at the School had undertaken various developments in the School including building blocks I and II, the swimming pool changing rooms, staff car park shed, waiting area shed and other developments.

3. During a meeting of the Executive Committee of the Parents Association held on 29/11/2001 the 2nd Defendant confirmed to the parents that the Ministry of Education had authorised the 2nd Defendant to privatise the School. Being apprehensive that the move to privatise the School would have a negative impact on the parents and pupils in the School, the Parents' Association filed **Nairobi High Court Misc. Civil Appl. No. 13 of 2002 Republic v Minister for Education, Ex parte Ali Seif and 2 others** which the 2nd Defendant joined as an Interested Party. The Plaintiffs averred that in an affidavit sworn on 22/3/2007, the Ministry of Education denied that it had taken a decision to privatise the School in 2001 while stating that the only decision taken was to stop aiding or assisting schools that were under the 2nd Defendant's management.

4. The Plaintiffs filed this suit seeking declarations that the 1st Defendant holds the Suit Property in trust for the Plaintiffs and other members of the public served by the School; that the Suit Property is public land; that the School shall remain a public school for the remainder of the term of the grant. The Plaintiffs also seek a declaration that the proprietary rights of the 1st Defendant in the Suit Property are limited to the value of the buildings it had erected on the land and that the developments on the suit Property put up using public funds and School levies are public property. The Plaintiffs seek an injunction to restrain the Defendants from converting the School from a public school to a private school.

5. In addition, the Plaintiffs seek an injunction to restrain the Defendants from doing anything that may limit the Plaintiffs, their children or the local community from enjoying and accessing free education funds and any other aid, or provision of teachers by the Teachers Service Commission (TSC). The Plaintiffs seek to have the School managed jointly by the Defendants and a School committee under the Education Act or exclusively by the City Council of Nairobi. They also seek to have the Defendants' role in the School confined to that of a sponsor pursuant to Section 8 of the Education Act. The Plaintiffs wish to have the Defendants compelled to use the rental income from the buildings on the Suit Property for the benefit of the School.

6. The 1st Defendant denied the Plaintiffs' claim in the defence filed on 27/11/2008. It stated that the Parents' Association was not recognised under the Education Act and therefore was not a legal entity. The 1st Defendant averred that the definition of a public school under the Education Act referred to a school managed and maintained by a local authority which was not the case in Aga Khan Primary School. It stated that the Aga Khan together with well-wishers had donated the bulk of the funds used to construct the buildings in the School. The 1st Defendant maintained that the School was privately owned and that by the Government's action of granting a title over the Suit Property to the 1st Defendant, the Government was intent on making the School a privately owned entity for public use. The 1st Defendant averred that as the sole owner of the School it had absolute discretion to determine whether the School should run as a private or public school under the Education Act. The 1st Defendant pleaded that the Plaintiffs suit was statute-barred and that the cause of action was extinguished 12 years after the grant was issued to the 1st Defendant.

7. In its Amended Defence and Counterclaim filed in court on 22/4/2009, the 2nd Defendant denied the Plaintiffs' claim and averred that it is a non-profit making organisation whose main objective is to provide quality education in the schools that it manages. It averred that school committees were established in schools that were maintained or managed by a local authority and that the School Nairobi was neither maintained nor managed by the local authority. The 2nd Defendant indicated that it would raise a preliminary objection that the Plaintiffs' were not an incorporated body and therefore had no capacity to institute these proceedings. It stated that the Suit Property was leased to the 2nd Defendant on 1/1/1979 for 9 years. It stated that it was the current lessee and has occupied the Suit Property from 2/1/1988 to date. It maintained that the School has always been a private school run as such and that no public funds or support other than the provision of teachers from TSC had been used to run the School. It denied that the School became a public school by reason of the voluntary contributions made by generations of parents at the School. It stated that just like in other private schools, parents pay school fees which the 2nd Defendant utilised to manage and run the School. It denied that the 1st Defendant held the Suit Property in trust for the general public and maintained that the 1st Defendant's title over the Suit Property was indefeasible and could only be challenged on grounds of fraud or misrepresentation.

8. The 2nd Defendant pleaded that the School is not a public school since the land on which the School is built and the buildings are owned by the 1st Defendant and contended that the Parents Association cannot claim ownership of the School based on their voluntary contributions. It maintained that the School has always been a private school since its inception in 1953. Further, that at the time this suit was filed there was a Government directive aimed at withdrawing teachers from TSC from the School. the 2nd Defendant averred that it has always strived to improve the quality of education and enhance the School's character since it has been responsible for the management of the operational and academic affairs in the School by offering academic guidance, professional development, provision of teaching and learning resources, procurement, accounting, treasury management, liaison with statutory authorities, human resource management, and the formulation of safety and security policies in the maintenance of existing facilities.

9. The 2nd Defendant stated that the Education Act applied to the School because the School was an assisted school under Section 2 of the Education Act even though it was always private, run as such until the Minister made a decision in 2001 to withdraw TSC teachers from the School, which meant that the 2nd Defendant would have the sole task of managing the School. The 2nd Defendant maintained that this suit is *res judicata* having been directly and substantially in issue in **Nairobi High Court Misc. Civil Application No. 13 of 2002**.

10. The 2nd Defendant pleaded that as the manager of the School and lessee of the Suit Property, it was the custodian of the property belonging to or found in the School including all buildings, fixtures and chattels. It averred that from 1953 to 2001 the running and operation of the School was carried out smoothly and the School delivered quality education with the School infrastructure being well developed and maintained. The 2nd Defendant averred that the School's standards dropped significantly during the hearing of **High Court Misc. Appl. No.**

13 of 2002 which was long protracted. The 2nd Defendant pleaded that Justice Nyamu (as he then was) held in his judgement delivered on 11/7/2008 that Parents Associations did not exist to manage schools; that the assignment of teachers to an unaided school does not make the school a public school; and that the Aga Khan Primary School was not a public school since the land on which the School is built together with the buildings are owned by the 1st Defendant. The 2nd Defendant urged that there must be an end to litigation.

11. The 2nd Defendant seeks a permanent injunction to restrain the Plaintiffs from interfering with its role as manager of the School and to have the parents' association restrained from running the School or dealing with the Suit Property. It also seeks a declaration that as lessee of the Suit Property it is entitled to quiet possession, peaceful enjoyment and exclusive possession of the Suit Property. In addition, it seeks a declaration that the School is a private School.

12. Anthony Mungai Kimuri gave evidence for the Plaintiffs. He stated that he was the current Chairman of the Parents' Association of the School's Committee. The School was started by the colonial Government which leased the Suit Property to His Highness Sultan Mohamed Shah in 1951 to hold in trust for the community for education purposes as shown on the title. There were conditions attached to the title including that the Government had a right to resume possession of the land. He stated that most of the infrastructure in the School including classrooms, were put up by parents through donations from well-wishers and the community around. Besides paying fees, he said the parents had undertaken development projects on the Suit Property valued at Kshs. 32,000,000/= which included the building blocks, dining hall, swimming pool and changing rooms, staff car park shed, waiting area sheds and other minor developments. He stated that of the 43 teachers at the School, 31 were hired by TSC, 2 were hired the Islamic Education Committee and the remaining 10 were paid by the Parents' Association from levies paid by the parents and the 2nd Defendant. He stated that like any other school, the School received funds for free primary education from the Government of Kenya. And that the School receives support of Kshs. 5560 per child every term which is only meant for public schools.

13. During the formative years, the School was built through public funds. He gave a breakdown of the funds remitted by the Government to the School between 1953 and at 1960. He stated that the School had over 10 buses purchased by parents but that the Defendants registered the buses in the 2nd Defendant's name who later sold 4 of the vehicles. He stated that parents put up a cafeteria in the School to enable pupil's access affordable meals but the Defendants took over the cafeteria and leased it out to a private entrepreneur. He stated that parents have been taking care of all the maintenance of the School properties except the provision of security and cleaning services which are done by the Defendants. He averred that the transfer of the title over the Suit Property to the 1st Defendant who leased it to the 2nd Defendant was puzzling and must have been done fraudulently. He produced a copy of the title issued in 1951 to His Highness the right Honourable Sir Sultan Mohammed Shah. The lease ran for 3 years from 1/4/1951 to 1/4/1954. Special Condition number 4 of the lease stated that the Government had the right to resume possession of the land granted if it was required for development or for public purposes. Condition number 5 provided that the grantee would use the land and buildings only for educational purposes for both sexes and a house for the principal. Under Condition 6, the education offered would be such as to reach the standards prescribed by the Education Ordinance of 1951 and all other ordinances supplementing or amending the 1951 Ordinance, to the satisfaction of the Director of Education.

14. Mr. Kimuri produced a copy of the title issued to His Highness the Aga Khan for 96 years from 1/4/1954 based on the conditions in the grant. Entry number 5 shows that the Suit Property was transferred to the 1st Defendant on 19/4/1979. Entry number 6 shows a lease to the 2nd Defendant for 9 years from 1/1/1979. The certificate of registration of schools dated 4/12/1961 confirmed that the School had a maximum number of pupils of 1000 and went up to standard 7 with double streams for boys and girls. He attached a copy of the letter 12/11/2007 from the School addressed to the Director of City Education in relation to the task force on the issues between Aga Khan education services and the parents. He annexed copies of minutes of the meeting held on 29/10/2007, a copy of the petition seeking confirmation of the ownership and management of the School as a public school together with lists of people who had signed the petition. He also attached a copy of the petition. He produced a copy of the letter dated 2/3/2011 addressed to the Permanent Secretary in the Ministry of Education on the status of this suit. He produced copies of the correspondence exchanged which show that at some point the parents were running a separate bank account and communicating with third parties as the parents' association. He produced the letter dated 28/10/2019 which confirmed that the parents had raised funds for the purchase of two school buses. He produced a write up from the Nairobi City Council on Community Sponsored Schools which listed Visa Oshwal, Aga Khan, Muslim Girls, Bohra Road, Khalsa Racecourse, SSD, Khalsa South C, Arya, Islamia and CGH. The report prepared by the Education Department delved into the issue of how development projects and funds for the development of schools were provided by the government even during the colonial times.

15. On cross-examination, Mr. Kimuri stated that at the time this suit was filed all the Plaintiffs were parents in the School. He stated that he had two daughters in the School. He stated that he became Chairman of the Parents Association in 2010 after this suit had been filed. One of the functions of the association was to chart the way in terms of development of the School in collaboration with the sponsor who is the 2nd Defendant in this case. He stated that the parents' association maintained some financial records. He stated that the School's Principal does not report to the 2nd Defendant, rather he reports to the County Director of Education. He stated that the School's fees was determined by the Ministry of Education. He stated that the running of the School on a day to day basis was done by the Principal and not the 2nd Defendant. He stated that the Government gives free primary education funds to the School with guidelines on how it should be spent. According to him, the 2nd Defendant's role in the running of the School was to manage religious matters in the School and make donations to the School which are administered through the bursar. He conceded that the 2nd Defendant had undertaken some developments in the School over the years. He added that the parents had undertaken developments in the School including buildings and that the Government also undertook some developments. He stated that the 2nd Defendant paid the 6 teachers who teach Islamic Education in the School. He stated that the School Principal was appointed by TSC and that the Government does not consult the 2nd Defendant when appointing the School Principal.

16. Mary Wangui Kang'ara gave evidence on behalf of the 1st Defendant. She stated that the 1st Defendant was the owner of the suit land and that it was leased to the 2nd Defendant for 9 years and that even though the formal lease expired, there was a subsisting tenancy arrangement between the 1st and 2nd Defendants. She denied that there was any trust relationship between the 1st Defendant and members of the public. She maintained that the special condition in the grant referred to the quality of education but did not stipulate that the Suit Property was public property. She stated that the Plaintiffs were not entitled to the remedies sought in the plaint because they are no longer parents in the School. She stated that the 1st Defendant had not breached any of the conditions attached to the grant. Further, she confirmed that the 1st Defendant had no intention of changing the manner in which the School has been run since its inception in 1963.

17. She produced a copy of the Government notice number 308 on the Indian and Goans Schools (grant-in-aid) Rules 1945; a copy of the report of the Committee on Indian Education together with an extract from the Report of the Committee on grants in aid for Education in Kenya. She maintained that the 1st Defendant had not transferred the School to any third party.

18. The 1st Defendant also called Domisiano Kimamia Wachira, an approved surveyor assistant to give evidence on its behalf. He produced his survey report dated 4/3/2019. He visited the Suit Property but was unable to identify the beacons on the Suit Property because he did not find them and that he therefore re-established the measurements of the Suit Property based on the deed plan using the coordinates. He used L.R. No. 214/375 as a stable cadastral point with beacons while re-establishing the boundaries of the Suit Property. He was emphatic that the survey records did not show that the Suit Property had been subdivided.

19. Moez Ismael Jamal gave evidence on behalf of the 2nd Defendant. He was the chairman of the 2nd Defendant at the time this suit was filed in court. He was chairman of the 2nd Defendant from 2005 to 2015. He explained that the Defendants are agencies of the Aga Khan Development Network which is a network of private, international, and non-denominational agencies working to improve living conditions and opportunities in some developing countries; in fields such as health, education, rural development and the promotion of private sector enterprise. The agencies work towards the common goal of building institutions and programs that can respond to challenges of social, economic and cultural changes. He stated that the 2nd Defendant and its predecessors have been engaged in providing education for the people of Kenya and that the Defendants have worked with the Government to support primary schools and good teaching and learning practice in Kenya in targeted regions. He emphasised that the 2nd Defendant is a non-profit making organisation whose main objective is to provide affordable, quality education in the schools it manages.

20. He stated that the 2nd Defendant has occupied the Suit Property under a periodic tenancy under the terms of the lease it entered into with the 1st Defendant on 1/1/1979 and that the 1st Defendant is the indefeasible owner of the Suit Property. That, by virtue of the fact that the 2nd Defendant derives its rights from the 1st Defendant, then the 2nd Defendant had the right to enjoy quiet possession of the Suit Property without interference from the Plaintiffs or any other person.

21. He maintained that the School was private and that it had always been run as a private school and is not controlled by the local authority. He stated that between 1953 and 1961, His Highness the Aga Khan and well-wishers donated more than Kshs. 892,377.38 towards the construction of the School. He added that the mere fact that Government funds may have been used in building part of the School does not convert it into a public school. Further, that this did not create a public trust in the School. He stated that TSC teachers were deployed to the School with the full knowledge that it was a private School. He added that just like in other private schools, parents paid fees at the School which the 2nd Defendant used to manage and run the School. He maintained that the Plaintiffs' intrusion into the 2nd Defendant's mandate in contempt of court orders had denied the 2nd Defendant access to school fees for some time.

22. He averred that the Defendants had complied with the special conditions stipulated in the title over the Suit Property. He added that Aga Khan Schools have come to be associated with high standards over time and that the School's standards dropped from 2002 following the Plaintiffs' interference with the running of the School. In order to maintain high standards in the School, the 2nd Defendant had provided 8 more teachers; employed the School bursar, cleaners, gardeners and pool attendants; provided security; and maintained some of the infrastructure.

23. Mr. Jamal reiterated the findings of Justice Nyamu (as he then was) in **Nairobi HC Misc Appl No. 13 of 2002** that the School was not a public school. He observed that prior to 2001, previous Parents Associations had not given any conditions for their participation in the School's infrastructural development nor had they laid claim to ownership or control of the School. He added that some of the Plaintiffs who were imposing conditions owed substantial sums of money in school fees arrears.

24. Parties filed written submissions which the court has considered. The Plaintiffs submitted that the transfer of the Suit Property to the 1st Defendant and its lease to the 2nd Defendant must have been done fraudulently and that His Highness the Aga Khan was to hold the Suit Property in trust for the community. They submitted that they now wanted to have the title revert to the School since it was illegally acquired. The Plaintiffs relied on the special conditions attached to the title over the Suit Property in support of their claim that the School is a public School. They urged that the conditions in the grant are not akin to private property and that the limitations on the use of the land show the trust element in the Suit Property.

25. The Plaintiffs submitted that Section 28 of the Education Act which was in force in 2008 specified the classification of schools over which boards were to have jurisdiction. They added that a maintained school was defined as a school in respect of which the Ministry or local authority accepted general financial responsibility for maintenance while an assisted school was one which received financial assistance from the Ministry or TSC. Section 2 defined public School as a maintained or assisted School. The Plaintiffs relied on the decision in **Machakos JR Misc. Appl. No. 39 of 2011 Republic v District Education Board Kathiani District and another, Ex parte Registered Trustees African Brotherhood Church [2016] eKLR** in which Nyamweya J. observed that Mitaboni ABC Girls Secondary School was receiving assistance from TSC and was therefore an assisted school within the jurisdiction of the Kathiani District Education Board.

26. The Plaintiffs submitted that in **Nairobi HC Misc Appl No. 13 of 2002**, the court did not interrogate how the title was acquired and further that the court could not have properly adjudicated the ownership of the Suit Property in the judicial review matter. The Plaintiffs also submitted that the court ought to consider that public interest must outweigh entrepreneurship and pay heed to the need for parents to have a say in the running of the School.

27. The 1st Defendant submitted that the Suit Property was intact and had not been subdivided as the Plaintiffs claimed. It also submitted that the Plaintiffs had failed to prove fraud against the Defendants in the transfer and lease of the Suit Property. Further, that the Government has never taken any steps or alleged that the Suit Property was fraudulently acquired by the 1st Defendant. It submitted that Justice Nyamu (as he then was) had in **Nairobi HC Misc Appl No. 13 of 2002** stated that ownership was a matter of land law and that on the facts of that case, the 1st Defendant owned both the land and the buildings and fixtures.

28. The 1st Defendant relied on the Court of Appeal decision in **Shree Visa Oshwal Community and Another v Attorney General and 3 Others [2019] eKLR** in which the court had occasion to consider similar provisions in the grant. The court observed that under the grant, a school was to be constructed on the suit land without specifying the category of school on whether it was private or public, day or boarding, IGCSE or 8-4-4. The court stated that the conditions in the grant were aimed at discouraging lessees from using the land for other purposes. The 1st Defendant submitted that it was the Ministry of Education that decided to stop giving grants to the School and that this administrative decision affirmed the status of the School as a private School.

29. The 1st Defendant also relied on the decision of the late Onguto J. in **Registered Trustees of Arya Pratinidhi Sabha, Eastern Africa v National Land Commission and Another [2016] eKLR** in which the court referred to the decision of Musinga J. (as he then was) held in **Petition No. 225 of 2008** that the distinction between private and public school could not be used to expropriate the petitioner's property. The late Judge Onguto found that previously it was the Education Act and now the Basic Education Act which made that distinction and it could not be used to divest the Petitioner of the suit land. While agreeing with Musinga J that deprivation of property cannot be dependent upon the distinction of the user of the property, Onguto J. declined to make a determination as to whether the school in the dispute was private or public. The court notes that what was in issue in that case was that the National Land Commission had at the behest of the Ministry of Education directed the petitioner which was the registered proprietor of the land on which Parklands Arya School stood to surrender the land for public purpose.

30. The 2nd Defendant submitted that having ceased to be parents in the School, the Plaintiffs had no locus to prosecute this case. It relied on the decision of Lady Justice Abida Ali Aroni in the preliminary objection in this suit where she held that the Plaintiffs could sustain this suit as individuals in their capacity as parents. The Defendants did not lead any evidence to rebut that of the Plaintiffs' witness who stated that he was still a parent and had two children in the School. The Defendants have access to school records and could have adduced evidence to show that the Plaintiffs had ceased to be parents in the School.

31. The 2nd Defendant submitted that the Plaintiffs had failed to prove fraud in the transfer of the Suit Property or that it was held under trust as the Plaintiffs contended. The 2nd Defendant urged the court to be guided by the Court of Appeal decision in **Shree Visa Oshwal Community and Another v Attorney General and 3 Others [2019] eKLR** in which the court held that the school on the disputed land, which was held on similar conditions as the Suit Property, could either be a private or public school and maintained that the Suit Property was privately owned by the 1st Defendant. The court stated that the conditions in the grant were aimed at discouraging lessees from departing from the use specified in the lease.

32. The 2nd Defendant also submitted that the suit was time-barred having been instituted 54 years after the grant and 29 years after the 2nd Defendant's interest accrued. The 2nd Defendant submitted that this suit was *res judicata* and that by excluding the 2nd Defendant in the management of the School, the Plaintiffs were in contempt of the orders made by the court on 29/10/2009 vide which the 2nd Defendant was to exclusively manage the School during the pendency of the suit. The 2nd Defendant urged the court to find that as the lessee of the 1st Defendant which was the indefeasible owner of the Suit Property, it was entitled to quiet possession of the suit land.

33. The court notes that the Chairman and Treasurer of the School Parents Association of the Aga Khan moved the court in **Nairobi Miscellaneous Application No. 13 of 2002** seeking a quashing order for the directive given by the Minister of Education to the effect that the Aga Khan Primary School be managed by the 2nd Defendant in this suit. The court dismissed the claim on grounds that it did not seek any judicial review orders and had failed to establish the grounds upon which the application was based. The issues raised in this suit are somewhat different and were not substantially in issue in **Nairobi Miscellaneous Application No. 13 of 2002**. The issues in this suit were neither heard nor finally determined in that suit which was an application for judicial review. This suit is therefore not *res judicata*.

34. The dispute between the Plaintiffs and the Defendants arose sometime in 2001 when the Government indicated that it would stop supporting schools that were under the 2nd Defendant and there was apprehension that the School would be privatised. The claim is not statute-barred as the 2nd Defendant contended.

35. The main issue for determination in this suit revolves around whether the Suit Property is public or private land. It is useful to look into the history of the Aga Khan Primary School which can be gleaned from the documents produced by the Defendants. The Governor of the colony of Kenya granted the Suit Property to His Highness Sultan Mohamed Shah on 1/4/1951 for three years. He was to use the land and buildings on it for educational purposes only for both sexes and a house for a principal. The education was to reach the standard prescribed by the Education Ordinance 1931 and all other ordinances supplementing it or amending it, and to the satisfaction of the Director of Education. Condition 9 prohibited the grantee from transferring or charging the demised land without the consent of the Commissioner of Lands, or selling the land without the Governor's written consent.

36. Condition 14 of the grant stipulated that the lessee could extend the lease for 99 years from 1/4/1951 if the grantee had erected buildings on the land. Pursuant to this clause, the lease was extended for 96 years on 2/4/1954. The lease was transferred to His Highness Shah Karim Al-Hussein Aga Khan on 7/6/1965. The lease was transferred to Aga Khan Foundation on 19/4/1978. Entry number 7 was registered as a lease to the 2nd Defendant for 9 years from 1/1/1979. The lease to the 2nd Defendant was subject to the special conditions, encumbrances and other matters referred to or contained in the grant registered as I.R. 8620/1. The lease stated at that the premises would be used as a school and not for any other purpose. Clause 1 (j) tasked the 2nd Defendant to maintain internationally acceptable standards of education within the general framework of the national educational policy and in particular to teach within the terms of the national laws on education academic syllabi leading to examinations and qualifications which are both nationally and internationally recognised.

37. The evidence adduced confirmed that the School was built with funds from the Government and grants from His highness the Aga Khan. The Director of Education and other Education officers wrote several letters to the School's Administrator on 21/1/1959, 9/2/1959, 1/9/1959, 17/12/1959 and 21/5/1960 regarding the grant-in-aid to aided Schools for the construction of more classrooms in the School. The letters referred to Asian development owing to the fact at the time schools were set aside for Europeans, Asians and Africans.

38. Aga Khan Mixed Primary School was set aside for Asians. The letter dated 9/2/1959 on Asian Development Capital Grant-in Aid addressed to Aga Khan Mixed Primary School alongside Cutchi Gujarati Hindu Union Duke Street, Kaloleni Indian School, Muslim Girls School, Sikh Girls School, Thomson Falls Indian School, Sotik Asian School, Nyeri Indian School, Bungoma Mixed Primary School and Goan Primary School lends credence to this fact indicated that the Aga Khan Mixed Primary School needed £ 10,000 from the Government to put up 7 additional classrooms.

39. The evidence led by the parties in the suit pointed to the fact that the 1st Defendant saw to it that the School was run well with support from the Government and His Highness the Aga Khan and other well-wishers from its inception. After Kenya attained independence, the support of parents came in to supplement the infrastructural development in the School. The Government also maintained teachers hired by TSC in the School while the Defendants hired and paid the teachers teaching Islamic religion. Everything went on very well in the School with both the Government and parents participating in the management of the School which was being run by the Defendants until 2001 when the Defendants claim the Government expressed its wish to withdraw TSC teachers from the School. The Plaintiffs contended that the Defendants attempted to make the School private and to do away with the participation of the Parents Association in the management of the School.

40. The Defendants countered that the 1st Defendant holds an indefeasible title over the Suit Property and that it should be allowed quiet possession of the suit land so that it can run the School as a private school. Under Section 24 (b) of the Land Registration Act, the registration of a proprietor of a lease vests in that person a leasehold interest described in the lease together with the rights appurtenant to it and *subject to all and implied or express agreements, liabilities or incidents of the lease*. Pursuant to Section 25, the rights of the registered proprietor are held free from all interests *but subject to encumbrances and the conditions and restrictions if any shown on the register*.

41. The 1st Defendant therefore holds the lease over the Suit Property not as an absolute proprietor of the lease, but subject to the special conditions shown on the title that enjoins it to use the land for educational purposes for both sexes. The education the 1st Defendant is mandated to provide by special condition number 6 of the grant must meet two prerequisites. Firstly, it must be of the standard prescribed by the Education Act in force and secondly, it must be to the satisfaction of the Director of Education.

42. As at 2008 when this suit was filed, the Education Act of 1980 revised in 2012 was in force. The repealed Education Act, defined a *public school* as a school maintained or assisted out of public funds, which meant funds of either the Government or the local authority. That Act defined an *assisted school* as one which received financial assistance from the Ministry of Education or from TSC. The evidence tendered by the Plaintiffs and the Defendants confirmed that besides having teachers hired by TSC, the School also received financial assistance from the Government during the colonial period and even after, which therefore brought it within the ambit of an assisted school. The letters written in 1959 and 1960 by the Director of Education while making grants-in-aid to the School referred to the School as an aided school. The Aga Khan Mixed Primary School is thus a public school.

43. Section 6 of the repealed Education Act provided that every assisted school not being maintained by a local authority would be managed by a board of governors or as the Minister in charge of education may direct. Section 10 empowered the Minister to establish the board of governors. The communities served by the school and the voluntary body which founded the school, such as the 1st Defendant and its predecessor, were to be included in the board of governors under Section 11 of the repealed Education Act. The Act set out the functions of the board of governors at Section 31 and the financial provisions at Section 32. The evidence adduced showed that both the Plaintiffs and the Defendants were wrestling over the financial management of the School which in the court's view should have been undertaken in compliance with Section 32 of the repealed Act.

44. Section 35 of the repealed Education Act empowered the Minister to make regulations prescribing the fees to be charged at any school which received a grant out of public funds and the liability of the parents for the payment of fees. Being an assisted school, the Minister of Education ought to have made regulations prescribing firstly, the fees to be charged at the Aga Khan Mixed Primary School, and secondly, any matter with respect to which the grant from the Government could be applied.

45. The Basic Education Act, 2013 repealed the Education Act. It was passed as an Act of Parliament to give effect to Article 53 of the Constitution; to promote and regulate free and compulsory basic education; and to provide for the registration, governance and management of institutions of basic education. This is the Act that should apply to the standards of education being offered by the 1st Defendant on the Suit Property under the terms of the lease which requires the standards to be to the satisfaction of the Director of Education or his successor in title.

46. The role of a sponsor is set out in Section 27 of the Basic Education Act of 2013 which states that a sponsor such as the 1st Defendant must have a representation in the school management; participate and make recommendations for the review of syllabus, curriculum, books and other teaching aids; provide supervisory and advisory services in matters regarding spiritual development in schools including the appointment of chaplains at their own expense; maintenance of spiritual development while safeguarding the denomination or religious adherence of others; and offer financial and infrastructural support.

47. The Suit Property is held by the 1st Defendant to use for educational purposes with deference to the Special Conditions set out in the lease. The 1st Defendant is enjoined to ensure that the education offered in the School is of the standard prescribed by the Basic Education Act and the only role the Parents Association can play is the role stipulated in the Third Schedule to the Basic Education Act.

48. The court declines to grant the orders sought in the suit or the counterclaim. Each party will bear its own costs.

49. The court directs the Defendants to convene a meeting within 60 days of the date of this judgement, under the direction of the Cabinet Secretary responsible for matters relating to basic education and training, to find a workable manner of managing the School within the standards prescribed by the Basic Education Act, 2013 and to the satisfaction of the successor in office of the Director of Education.

Dated and delivered at Nairobi this 28th day of October 2019

K.BOR

JUDGE

In the presence of:-

Mr. J. Mugo for the Plaintiffs

Mr. H. Shah for the 1st Defendant

Mr. G. Thuo for the 2nd Defendant

Mr. V. Owuor- Court Assistant